Notes

Executive Targeting of Congressmen as a Violation of the Arrest Clause

Federal law enforcement has expanded to give the executive branch potent new weapons for investigating crime.[1] These new techniques, including undercover activity and surveillance, have created an unprecedented potential for abuses that not only endanger the constitutional rights of private citizens, but may threaten the balance of power between the executive and Congress.

"Executive targeting," as described in this Note, refers to the deployment of law enforcement power against a congressman with intent to discredit him, and without prior reasonable cause to suspect that he has committed a crime.[2] "Legitimate law enforcement," on the other hand, takes place when the executive suspects that a crime has occurred and deploys the law enforcement power to investigate that crime. Targeting first identifies a victim and then discovers his offenses; legitimate law enforcement first discovers an offense and then seeks to find out whether the actor is criminally responsible.[3] Although the executive can target any adversary,

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1. Responsibility for early federal law enforcement was confined mainly to the United States marshals, the Capitol police, and the Coast Guard. B. REKTOR, FEDERAL LAW ENFORCEMENT AGENCIES (*passim*) (1975). Prohibition and the resultant rise in organized crime expanded federal law enforcement. L. DODD & R. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 29 (1979). *See also* Note, *The Scope of Federal Criminal Jurisdiction Under the Commerce Clause*, 1972 U. ILL. L. F. 805, 806-07 (invention and success of automobile an impetus toward expanding federal criminal jurisdiction).

2. The "reasonable cause to suspect" standard is less stringent than the "probable cause" required for the issuance of warrants under the Fourth Amendment. United States v. Ramsey, 431 U.S. 606, 612-13 (1977). *See also* Terry v. Ohio, 392 U.S. 1, 26-27 (1968) and United States v. Mejia, 720 F.2d 1378, 1381-82 (5th Cir. 1983) (distinction between probable cause and reasonable suspicion).

This Note intends such male-specific words as "congressman" and "middleman" to be read as gender-neutral. Alternative terms seemed cumbersome or unclear.

3. Justice Robert Jackson, while serving as U.S. Attorney General, discussed the difference between the two actions:

> In such a case it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the lawbooks, or putting investigators to work, to pin some offense on him. It is in this realm . . . that the greatest danger of abuse of prosecuting power lies.

R. Jackson, The Federal Prosecutor (1941) (available at Yale Law School library).

the constitutionally determined tension between the executive and legislative branches[4] makes congressmen uniquely vulnerable targets of abuse of the law enforcement power.

Current interpretations of constitutional law do not adequately protect congressmen from executive targeting. This Note argues that the constitutional privilege from arrest[5] should provide such protection. Modern constitutional law does not recognize the urgent relevance to executive targeting of the concern embodied in the arrest clause: preventing pernicious executive intrusion into the legislative branch.

To address the threat of intrusion, this Note proposes legislation to create special judicial oversight of all criminal investigations involving members of Congress.[6] Before initiating such investigation, the executive should be required to show to a judicial tribunal a reasonable suspicion of past criminal conduct. Judicial preclearance of investigations involving congressmen would honor the specific separation of powers mandate found in the arrest clause, while respecting at the same time the needs of legitimate law enforcement.

I. Executive Power to Target Congressmen

An executive branch official wishing to target a congressman can employ law enforcement power that is now deeper and broader than in earlier years. The modern executive official has more law to enforce, and more sanctions at his or her disposal, than the original theorists of tripartite government foresaw.[7] The federal law enforcement bureaucracy also has grown in prominence and power. Expanding budgets,[8] new technol-

4. *See generally* The Federalist No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961) ("Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."); *see also* J. Burns, Roosevelt: The Lion and the Fox 340 (1956) (President and Congress in "conflict artfully contrived and institutionalized by the Framers of the Constitution.").

5. "The Senators and Representatives . . . shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the Same. . . ." U.S. Const. art. I, § 6.

6. A similar proposal is discussed in Wilson, *The Real Issues in Abscam*, Wash. Post, July 15, 1982, at A19, col. 2 (establishing judicial panel to review certain law enforcement investigations concerning Congress with reasonable suspicion standard); *cf.* Note, *Judicial Control of Secret Agents*, 76 Yale L.J. 994, 1017-18 (1967) (statutory framework for prior judicial control of undercover activity).

7. *See* Conboy, *Federal Criminal Law*, in 1 Law: A Century of Progress 1835-1935, at 295, 301 (1937) (federal criminal jurisdiction originally narrow because of fear of usurpation of states' powers); *see also* Note, *supra* note 1, at 805 (few constitutional grants of law enforcement power to national government). For a discussion of the development of substantive federal criminal law, see McClellan, *Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 Duke L.J. 663, 672-85.

8. The budget for fiscal year 1985 raised the Department of Justice's law enforcement budget by 3% to a total of $3.5 billion. United States Office of Management and Budget, Budget of the United States Government 1985, at 5-142, 5-143 (1984). Most of the increase was sched-

ogy,[9] and the general expansion of federal agencies provide the executive with the tools for targeting.[10] Even though the President, insulated by a circle of loyal subordinates and immunity from personal damage actions,[11] may choose not to target, other powerful members of the executive branch acting to fulfill either their personal agendas or the President's wishes can use their executive power to harm adversaries.[12]

These adversaries are more likely to be congressmen than private citizens. Whereas enmity between the executive and ordinary citizens arises only under special circumstances, political conflicts and the presidential ambitions of many congressmen make it likely that the executive branch will have adversaries in Congress. Executive targeting of congressmen uses institutional powers to seek advantage in institutional conflicts.[13]

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uled to be spent on criminal justice, especially the hiring of new law enforcement agents, an expansion of local prosecutors' offices, and new prison construction. *See* N.Y. Times, Jan. 2, 1984, at 1, col. 3.

9. For example, the Department of Justice recently purchased for the FBI a new fingerprint identification system and a $91 million radio scrambler. *See* N.Y. Times, *supra* note 8. The most significant statutory recognition of the strength of technology in law enforcement is the Foreign Intelligence Surveillance Act's requirement that a judicial warrant be obtained before wiretapping may take place. *See* 18 U.S.C. § 2518 (1982).

10. The Internal Revenue Service was used by at least two presidents to harass political enemies. *See* J. LUKAS, NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS 22–26 (1973) (President Nixon's use of IRS against alleged radicals); G. BENSON, POLITICAL CORRUPTION IN AMERICA 151 (1978) (President Roosevelt's use of federal tax indictments of Senator Huey Long). For an account of Roosevelt's conflicts with Senator Long, see J. BURNS, *supra* note 4, at 210–15.

President Nixon's abuses of the executive power are well documented. *See Articles of Impeachment,* H.R. REP. NO. 1305, 93rd Cong., 2d Sess. (1974); W. SHANNON, THEY COULD NOT TRUST THE KING (1974). The White House's infamous "enemies list," prepared in 1971, included 28 congressmen, among them Senators William Fulbright, Edward Kennedy, Walter Mondale, Edmund Muskie, and Representatives Bella Abzug, Father Robert Drinan, and the entire black membership of the House of Representatives. L. CHESTER, WATERGATE 81, 269 (1973).

11. *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982) (absolute presidential immunity from suits for damages predicated on official acts); *cf.* Harlow v. Fitzgerald, 457 U.S. 800 (1982) (absolute immunity available also to presidential aides, if suit predicated on aides' exercise of discretionary authority in sensitive matters); Butz v. Economou, 438 U.S. 478 (1978) (qualified immunity for federal executive officials). Actions for libel are not available to congressmen injured by the harmful publicity of an indictment. *See* Marshall, *2 Scandals, Not 1,* N.Y. Times, Feb. 7, 1980, at A23, col. 1.

12. J. Edgar Hoover, in particular, served both his own ambitions and those of other executive branch members through the FBI's law enforcement power. When Robert Kennedy wanted to secure evidence to convict Jimmy Hoffa of crimes, Hoover deployed the FBI to keep Hoffa under continuous surveillance. *See* V. NAVASKY, KENNEDY JUSTICE 400, 404–10 (1970). Out of his personal hostility, Hoover ordered electronic surveillance of Martin Luther King, Jr. *See id.* at 137, 153–55. Hoover seldom turned the FBI's power on congressmen to gather evidence for prosecution. *See* Wilson, *The Changing FBI—The Road to Abscam,* 59 PUB. INT. 3, 3 (1980). Yet Hoover remained useful to targeting efforts. For example, President Johnson urged him to suggest on national television that Senators Fulbright, Morse, Robert Kennedy, Gruening, Clark, and Aiken, who had visited the Soviet embassy, were linked with espionage activity. *See* W. SULLIVAN, THE BUREAU 64–65 (1979). Johnson also requested that the FBI find derogatory information about Senator Fulbright, who had attacked Johnson's policies. *Id.* at 235.

13. Arguably, a president's vendettas against congressmen have less to do with their status as congressmen than with their personalities or their potential as rival presidential candidates. In this view, Nixon's targeting of congressmen does not differ analytically from, for example, the White House's attempt to smear Daniel Ellsberg by planting a copy of the Pentagon Papers at the Soviet Embassy. *See* W. SHANNON, *supra* note 10, at 24–28 (recounting Ellsberg incident). This view overlooks two key distinctions. First, the persons targeted cannot be severed from their occupations and the

A. *The Consequences of Congressional Vulnerability*

Aimed specifically at congressmen, targeting violates the institutional independence of Congress. It taints the integrity of the entire institution, weakening Congress' ability to take the leadership role in setting policy that the Constitution envisions.[14] Targeted congressmen cannot effectively represent their constituents or participate in the legislative process. Executive targeting simultaneously reduces representation and the legitimacy of institutional action by Congress as the elected assembly of all the people.

Effective undermining of Congress, of course, depends on a public perception of the results of targeting. The newsworthiness of allegations of congressional wrongdoing creates unfavorable publicity, which no subsequent adjudication and quashing can entirely erase.[15] A mere indictment may cost a congressman his job and his future career in politics.[16]

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attendant power and visibility. Second, the targeting of a congressman spreads detrimental effects to others, particularly constituents and Congress itself, whereas the targeting of individuals does not attack the institution of legislative representation.

14. *See* N.Y. Times, Feb. 5, 1981, at B8, col. 3 (Representative Robert Livingston's statement that "[t]he allegations that have hit the press [in regard to Abscam] represent an indictment of the entire Congress"). The broad policy-setting powers of Congress enumerated in the Constitution are found in art. I, § 8 (general powers, including necessary and proper clause); art. IV, § 3 (admitting new states into Union and controlling territories); art. V (role in ratification of constitutional amendments); and amendments XIII, XIV, XV, XIX, XXIII, XXIV and XXVI (passage of legislation appropriate to secure individual rights).

15. For criticism of the prejudicial effect of publicizing decisions to prosecute, see Marshall, *supra* note 11 ("If our representatives in Congress . . .willingly accept bribes for even ambiguous favors, they should be prosecuted with vigor and impartiality, but it is grossly unfair—it is outrageously unlawful, unprofessional and unconscionable—for the prosecutions to be commenced by leaks to the press. . . ."); Freedman, *Discipline an Errant Prosecutor*, N.Y. Times, Jan. 16, 1984, at A15, col. 2 ("accused is convicted by publicity, without due process"); *cf.* N.Y. Times, Dec. 14, 1980, at A1, col. 1 (Senators Javits and Moynihan claim injuries to reputation after being mentioned in court as possible Abscam targets).

Senator Larry Pressler, upon the invitation of a middleman, attended a meeting where undercover agents brought up the subject of a $50,000 contribution to Pressler's campaign fund in exchange for his support of a private bill. Pressler refused to agree to the transaction. After considerable publicizing of Pressler's having been approached for a bribe, FBI director William Webster sent Pressler a letter of exoneration. The lingering taste of Pressler's experience prompted remarks from a Senate colleague, Warren Rudman:

> Senator Pressler will carry this for life. It is almost like someone who has been exposed to radiation. The doctors tell them they are all right, but every day of their life they wonder if something is eating away at them. Hardly a day has gone by . . . that Senator Pressler has not at some point during the day on the floor come up and said something about: I hope that maybe I can finally be cleared. And I said to him: Larry, you are clear, there is no question; you have a letter, essentially, almost, I would say, of apology from the Director of the FBI. But in his mind he was tainted.

FBI Undercover Operations: Report of the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, H.R. REP. No. 11, 98th Cong., 2d Sess. 30-31 (1984) [hereinafter cited as *FBI Undercover Operations*].

16. Most congressmen accused of corruption prevail if they reach the general election. Within this category, however, bribery and morals charges result in more severe electoral retribution. Peters & Welch, *The Effects of Charges of Corruption on Voting Behavior in Congressional Elections*, 74 AM. POL. SCI. REV. 697, 703 (1980). Moreover, pre-election attrition takes place in the form of resignations, primary defeats and decisions not to run. Seventy-five percent of the congressmen accused of corruption during the campaigns of 1968 through 1978 who reached the general election were re-

Targeting exploits the executive power to command both publicity and secrecy. Mistakes or failures of law enforcement action can be concealed, and fruitful targeting announced. The best-documented category of executive targeting—monitoring and surveillance, where the executive orders scrutiny of the target in the hope of learning damaging information—has emphasized secrecy.[17] Yet the executive may also employ a new law enforcement technique, the undercover "sting operation,"[18] for the benefits of publicity that it can deliver.[19] Two sting operations resulting in prosecutions of legislators have received national attention. Despite approval by courts[20] and observers,[21] these enterprises point out a broad potential for abuse.

As a result of the FBI sting operation known as Abscam,[22] seven

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elected, but only 62 percent survived the entire process. *Id.* at 702. *See also Final Report of the Select Comm. to Study Undercover Activities of Components of the Department of Justice,* S. REP. NO. 682, 97th Cong., 2d Sess. 682–99 (1982) [hereinafter cited as *Select Committee*] (selected list of prosecutions of congressmen, 1798–1981).

17. *See, e.g.*, J. LUKAS, *supra* note 10, at 16–17 (surveillance of Senator Kennedy and housemates of Mary Jo Kopechne after Chappaquiddick disclosure; Nixon memorandum to aide, Haldeman, urging that "one of our best people" be assigned to "the Teddy Kennedy fight").

18. The Attorney General's guidelines on FBI undercover operations define an undercover operation as "any investigative operation in which an undercover employee is used"; an undercover employee is an employee of the FBI "whose relationship with the FBI is concealed from third parties in the course of an investigative operation by the maintenance of a cover or alias identity." *Attorney General's Guidelines on FBI Undercover Operations, reprinted in Select Committee, supra* note 16, at 536, 538. Undercover operations were uncommon in federal law enforcement until after their successes in Drug Enforcement Administration cases during the 1970's. Wilson, *supra* note 12, at 10. The FBI did not expressly request funds for undercover activities from Congress until 1976. With $1 million appropriated for undercover activities in fiscal 1977, the FBI conducted 53 undercover operations. In fiscal year 1981 the FBI conducted 463 undercover operations with a specified appropriation of $4.5 million. *Select Committee, supra* note 16, at 1. The FBI allotted $12,518,000 to undercover work for fiscal year 1984. *FBI Undercover Operations, supra* note 15, at 12.

19. *But see FBI Undercover Operations: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 97th Cong., 2d Sess. 495, 496 (1983) [hereinafter cited as *Hearings*] (statement of Philip Heymann, professor, Harvard Law School) (malicious executive would use investigative power rather than undercover operation).

20. *See* United States v. Williams, 705 F.2d 603 (2d Cir.), *cert. denied,* 104 S. Ct. 524 (1983); United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), *cert. denied,* 456 U.S. 962 (1982); United States v. Murphy, 642 F.2d 699 (2d Cir. 1980); United States v. Myers, 635 F.2d 932 (2d Cir.), *cert. denied,* 449 U.S. 956 (1980). *But see* United States v. Kelly, 539 F. Supp. 363, 374 (D.D.C. 1982), *rev'd,* 707 F.2d 1460 (D.C. Cir.), *cert. denied,* 104 S. Ct. 264 (1983) (district court opinion, later reversed, criticizing government conduct in Abscam), and United States v. Jannotti, 501 F. Supp. 1182, 1200 (E.D. Pa. 1981), *rev'd,* 673 F.2d 578 (3d Cir.), *cert. denied,* 457 U.S. 1106 (1982) (same).

21. *See* Etzioni, *Worry More About Our Crooked Pols,* Wash. Post, Sept. 19, 1982, at B1, col. 1 (sting operations necessary to law enforcement); Wilson, *supra* note 12. *But see* Glekel, *A Case Against Abscam,* N.Y.L.J., Oct. 8, 1980, at 1, col. 2 (sting operations as threat to legislative independence); McCarthy, *Beyond J. Edgar,* NEW REPUBLIC, Mar. 29, 1980, at 24 (attacking Abscam as attempting "the business of purifying politics"); Safire, *The Honesty Test,* N.Y. Times, Feb. 7, 1980, at A23, col. 5 ("A new form of law enforcement is being tried. It's called 'the honesty test.' An FBI man offers you some cash; if you turn it down, you go free. If you take the money, you are tried and convicted on television the same night. It's a lot quicker and easier than the old jury system.").

22. The term is a contraction of Abdul Enterprises, Ltd., the fictitious business contrived by FBI agents, and "scam," a slang expression meaning confidence game or swindle. United States v. Myers, 635 F.2d at 934 n.1.

members of Congress were indicted and convicted on charges of bribery and conspiracy to commit bribery, and forced out of office.[23] Gamscam, a sting operation conducted jointly by the FBI and the state of Washington's Organized Crime Intelligence Unit, resulted in the conviction of two state legislators.[24] Neither Abscam nor Gamscam originated as sting operations against the legislature: Abscam was devised to solve crimes involving securities and art works,[25] and Gamscam began as an inquiry into local corruption in Vancouver, Washington.[26] In both operations the metamorphoses into legislative sting operations remain obscure;[27] in neither operation did the executive explain the transition. Exploring the question of whether the executive branch had singled out certain congressmen for bribe offers, the Senate select committee that investigated Abscam concluded that no congressman who attended the FBI's videotaped meetings had been chosen for a bribe unless a middleman had suggested his name.[28] The committee did find that targeting activity nonetheless took place in Abscam: An informant working with the Abscam agents exploited a middleman's innocuous reference to a congressman to justify the attempt to bribe him.[29] The committee also used the term targeting[30] to describe Ab-

23. Two charges common to all congressional defendants were bribery, in violation of 18 U.S.C. § 201(c) (1982), and conspiracy to commit bribery, in violation of 18 U.S.C. § 371 (1982). Representative Murphy was acquitted of bribery but convicted of taking an unlawful gratuity. Representative Kelly's motion to dismiss on due process grounds was granted, but later reversed. United States v. Kelly, 539 F. Supp. 363 (D.D.C. 1982), *rev'd*, 707 F. 2d 1460 (D.C. Cir.), *cert. denied*, 104 S. Ct. 264 (1983). All other congressional defendants were found guilty of all major charges at the trial level. Representative Kelly was defeated in the Republican primary; Representatives Jenrette, Murphy, Myers, and Thompson were defeated in the 1980 general election. U.S. NEWS & WORLD REPORT, Nov. 17, 1980, at 39. Of the seven only Representative Lederer was reelected after indictment; he resigned on May 5, 1981. Senator Williams resigned on Mar. 11, 1982. On Oct. 2, 1980, Representative Myers became the first congressman in nearly 120 years to be expelled from the House. N.Y. Times, Mar. 12, 1982 at B2, col. 4.

24. *See* United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982).

25. *Select Committee, supra* note 16, at 401-04; *see also id.* at 83 ("[T]he record is unclear as to why and on whose authority the focus of Abscam changed from an undercover operation aimed at property crimes to one directed at political corruption").

26. *See Bagnariol*, 665 F.2d at 880.

27. *See Select Committee, supra* note 16, at 83; Seattle Post-Intelligencer, Apr. 20, 1980, at 1 (noting unclear transition).

28. *Select Committee, supra* note 16, at 13.

29. *Id.* at 57-66. For discussion of the possibility of law enforcement abuse involving middlemen, see Note, *Entrapment Through Unsuspecting Middlemen*, 95 HARV. L. REV. 1122 (1982); *Hearings, supra* note 19, at 638 (middleman as "unguided missile"); Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 286-91 (1975) (dangers of contingency-based compensation of middlemen); Kotz, *ABSCAM's Loose Cannons*, NEW REPUBLIC, Mar. 29, 1980, at 21 (unreliability of middlemen).

30. *See Select Committee, supra* note 16, at 67-68. This Note uses the term "targeting" somewhat differently from its use in the Select Committee report. As defined here, targeting must be done by the executive branch; the Select Committee report, however, described as "targeting" the independent behavior of Melvin Weinberg, who was not a member of the executive branch. *Id.* at 58-61. Interestingly, the committee also considered "targeting of Congress as a group." *Id.* at 77-83. Although this Note focuses on actions against individual congressmen, it makes the analogous argument that target-

scam's focus on Democratic congressmen from New Jersey and Philadelphia. The two state legislators who were convicted in Gamscam also used the term targeting to allege that the governor of Washington sought to harm them because of their political aspirations.[31]

Undercover operations into a legislature highlight the inherent asymmetry of targeting: The executive emerges as the moral crusader or law enforcer, and the legislators appear, at best, merely to have escaped guilt.[32] This uneven result is acceptable if the operations arise in the course of legitimate law enforcement. But if the operations arise from bad motives of executive officials, then the result is unacceptable. It spreads a ripple of reward for partisan hostility within the executive branch. Individuals who wield executive power can end a legislator's career, and Congress can neither fend off nor entirely repair the damage.

B. *The Failure of Safeguards*

Because targeting uses the law enforcement power, against which congressmen now have no special immunities, current safeguards against abuse by the executive provide only those protections available to ordinary citizens. These safeguards offer inadequate protection. They fail either because they are overbroad and cannot anticipate the specific details of targeting, or because they provide an insufficient opportunity to prove targeting. In any case, they cannot remedy a substantial portion of the harm resulting from targeting.

1. *Legislation Against Targeting*

The power of Congress to enact legislation suggests the possibility of either a prospective or a retrospective response, such as legislative hearings, to the problem of targeting. But targeting eludes such responses. A

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ing of individuals implicates the entire Congress. *See supra* pp. 649–50.

31. The two legislators were Gordon Walgren, majority leader of the state senate, and John Bagnariol, speaker of the state house. Both men had made known their intentions to run political races disfavored by the governor, Dixy Lee Ray: Bagnariol was to run against her in the next Democratic primary, and Walgren against her chosen candidate for state attorney general. *See* Seattle Post-Intelligencer, Apr. 20, 1980, at 1 ("Dixy Involved in FBI Sting?") and Apr. 16, 1980 ("Is the State Patrol Dixy's Private Praetorian Guard?"). Walgren suggests that Governor Ray was able to involve the FBI in Gamscam by exploiting Walgren's "political jousting" with the local U.S. Attorney. Letter from Gordon Walgren to author (Dec. 13, 1983) (on file with the *Yale Law Journal*).

32. Several members of Congress, including Larry Pressler, *see supra* note 15, James Florio, William Hughes, and James Howard, were approached by Abscam-employed middlemen and did not accept bribe offers. Warner, *The Troubling Ethics of Abscam*, TIME, Feb. 18, 1980 at 21. The refusals, and the direct implication that congressional honor had been demonstrated, received very little press coverage. *Cf.* Marx, *The New Police Undercover Work*, 8 URB. LIFE 399, 413 (1980) (suggesting that police undercover work, whatever its result, is immune from criticism: Proponents contend that failure to apprehend criminals means that deterrent effect has forestalled crime, and successful arrests serve to catch criminals).

retrospective approach is forestalled by the divisive effect of targeting. Once targeting becomes known, much of the damage is over, and each congressman must confront the difficult individual decision of whether to support or repudiate a publicly humiliated colleague. Legislative checks require group action, but the range of individual reaction undermines the cohesion and effectiveness of a collective response.[33] The prospective approach—enacting legislation that prohibits targeting—is infirm in other ways. First, since targeting is subsumed under law enforcement, a definition of bad motive precise enough for the federal code would prove difficult to formulate in advance. Second, even if laws against targeting could be written, they would risk diminishing the public's estimation of congressional integrity: Such laws might appear to insulate congressmen from the federal criminal code.[34]

The modified version of the protection-through-legislation approach that Congress adopted in the late 1970's has not addressed adequately the problem of targeting. These post-Watergate laws[35] responded to the targeting tactics used by President Nixon: income tax prosecutions,[36] retribution against whistleblowers,[37] and gathering of information.[38] Future

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33. *Cf.* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 270 (1980) (noting contemporary justification for judicial review of separation of powers because "the President can injure individuals by abusing the executive authority and . . . Congress, because of institutional infirmities, cannot effectively prevent this.")

Part of the difficulty in searching for institutional safeguards against executive abuse lies in the Framers' deep-seated fear of legislative abuse. *See* THE FEDERALIST No. 48, at 310 (J. Madison) (C. Rossiter ed. 1961) (legislative branch warrants especially careful concern, because it funds other branches); T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120–21 (W. Peden ed. 1955) (1st ed. London 1787) (emphasizing threat of the legislature); *see also* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 603 (1984) (constitutional convention arose out of practical and theoretical dissatisfaction with legislative government).

34. Judges have suggested that Congress may indeed insulate itself through legislation. *See* United States v. Brewster, 408 U.S. 501, 524 (1972) ("[T]he Congress, of course, is free to exempt its Members from the ambit of federal bribery laws . . . ."); United States v. Myers, 635 F.2d 932, 939 (2d Cir.) (Congress may redefine bribery offense to exclude acceptance of bribes offered to members by undercover agents), *cert. denied*, 449 U.S. 956 (1980). The obvious rejoinder—that Congress could never actually enact such protective legislation, or even a lesser variant—suggests the need for a new safeguard against executive abuse. The very nature of the legislative process often prevents legislators from acting in their own interest. Constituent pressure and legislative accountability, though essential checks on the behavior of the legislators, tend to steer Congress away from self-protecting measures. These considerations may explain, for example, the occasional choice of congressmen not to vote for salary increases but to raise members' compensation through liberal expense allowances and relaxed rules for honoraria.

35. *E.g.*, Freedom of Information Act, 5 U.S.C. § 552 (1982) (amended in 1974); Privacy Act of 1974, 5 U.S.C. § 552(a) (1982); Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified in scattered sections of 2, 5 app., 18, and 28 U.S.C.); the whistleblower provisions of the Civil Service Reform Act, 5 U.S.C. § 2302(b)(8) (1982); Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401–22 (1982); the tax information disclosure provisions of the Tax Reform Act of 1976, 26 U.S.C. § 6103 (1982).

36. *See* NEW YORK TIMES, THE END OF A PRESIDENCY 46–47 (1974) [hereinafter cited as END OF A PRESIDENCY].

37. *See* Nixon v. Fitzgerald, 457 U.S. 731, 734–35 (1982) (civil servant fired after testifying about overruns in Defense Department budget).

38. *See* END OF A PRESIDENCY, *supra* note 36, at 47–48.

targeting could overcome the hurdles presented by these laws, because the executive will always be able to abuse the legitimate law enforcement tactics that remain available.[39] Strengthening of the post-Watergate laws, however, is likely to inhibit legitimate law enforcement by preventing executive use of valuable investigating techniques or undermining necessary secrecy of operations.[40]

2. *Defenses of Law: Selective Prosecution and Entrapment*

If the executive targets a congressman and subsequently brings criminal charges, the congressman may claim selective prosecution.[41] In cases of sting operations, a congressman may invoke the entrapment defense as well.[42] Both defenses have proved generally ineffectual in practice;[43] they pose certain conceptual problems as well.

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39. Statutory specificity, when used to address the potential for abuse, tends to be reactive rather than proactive. Because the contours of law enforcement cannot be foreseen, the executive needs discretion, and a policy of broad discretion cannot be reined in with requirements installed in memory of old abuses. For the reverse side of this problem—the deleterious effect of specific curbs on law enforcement—see *infra* note 40.

40. "Necessary secrecy" has long been recognized as an integral part of national government. *Cf.* Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (presidential intelligence sources "are not and ought not to be published to the world"). It is difficult, however, to draw an appropriate statutory balance between secrecy and safeguarding against abuse.

One attorney general, who served as the post-Watergate statutes began to take effect, has suggested that these laws interfere significantly with law enforcement activity. The Freedom of Information Act may discourage citizens from disclosing law enforcement information needed to prosecute a case; the Tax Reform Act changes require Justice Department prosecutors to meet a difficult evidentiary burden before tax information can be released; the Ethics in Government Act requires broad-scale federal prosecution in situations that divert and may misallocate Justice Department resources. *See* Civiletti, *Post-Watergate Legislation in Retrospect*, 34 Sw. L.J. 1043, 1047, 1049–50, 1053–56 (1981).

41. The origins of the selective prosecution defense lie in Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (administrative regulation "applied and administered . . . with an evil eye and an unequal hand" violates equal protection clause). Selective prosecution cases in the federal courts have generally arisen in the context of draft resistance. *Compare* United States v. Schmucker, 721 F.2d 1046 (6th Cir. 1983) (draft resister entitled to hearing on selective prosecution claim) *and* United States v. Falk, 479 F.2d 616, 618–20 (7th Cir. 1973) (same) *with* United States v. Wayte, 710 F.2d 1385 (9th Cir. 1983) (no selective prosecution in enforcement of Selective Service registration requirement against vocal opponent of requirement), *cert. granted*, 104 S. Ct. 2655 (May 29, 1984). Analogous defenses include bad faith prosecution, *see* Shaw v. Garrison, 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972), and vindictive prosecution, *see* Blackledge v. Perry, 417 U.S. 21, 27–29 (1974); United States v. Burt, 619 F.2d 831, 836–37 (9th Cir. 1980). *Cf.* United States v. Margiotta, 688 F.2d 108, 143 n.5 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part) (threat of "federal prosecutors with largely unchecked power to harass political opponents"), *cert. denied*, 461 U.S. 913 (1983). For a comparative look at the normative foundations of the defense of selective prosecution and its analogues, see Schwartz, *The Limits of Prosecutorial Vindictiveness*, 69 IOWA L. REV. 127, 131–35 (1983).

42. For recent discussions of the entrapment defense, see Duke, *Entrapment Defense Languishes in Permanent State of Confusion*, NAT'L L.J., Mar. 21, 1983, at 30; Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 236–39 (1982); Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111.

43. *See* Amsterdam, *The One-Sided Sword: Selective Prosecution in Federal Courts*, 6 RUT.-CAM. L.J. 1, 6 (1974) (deference of judiciary to prosecutors); Duke, *supra* note 42 (entrapment defense too

To raise a successful defense of selective prosecution, a defendant must show selective enforcement of the law based on unjustifiable criteria.[44] This defense addresses only one part of targeting—the prosecution—while leaving initiation and manipulation of publicity unchecked. A recent case involving prosecution of a congressman, *United States v. Diggs*,[45] implied that unless targeting is blatant enough to expose some unjustifiable criteria before discovery, a court will not permit pretrial discovery on the issue.[46]

The entrapment defense enjoys stronger support than does the defense of selective prosecution,[47] but it too is unlikely to prevent the conviction of a targeted congressman. Courts have interpreted the two Supreme Court cases that established the defense[48] to mean that entrapment exists only when the defendant had not been predisposed to commit the crimes charged.[49] The Supreme Court's analysis, focusing on the state of mind of the defendant rather than on the conduct of the police,[50] provides little

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incoherent to protect against targets of government investigations).

44. *See* Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. ILL. L.F. 88. Unjustifiable criteria, derived from Oyler v. Boles, 368 U.S. 448, 456 (1962), include arbitrary classifications such as race and religion. *See also* United States v. Berrios, 501 F. 2d 1207, 1211 (2d Cir. 1974) (adding "the desire to prevent [the defendant's] exercise of constitutional rights" as unjustifiable criterion for selective prosecution defense). These criteria do not reach the problem of targeting, and no congressman has ever prevailed with this defense.

45. 613 F.2d 988 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980).

46. Representative Diggs supported his claim by arguing that the government had evidence of similar violations of law by three other congressmen and yet did not prosecute them. In response, the court stated that one of those congressmen, James Hastings, had indeed been prosecuted. *Id.* at 1003-04. (Representative Hastings had in fact been convicted before the appeal in *Diggs*. *See* United States v. Hastings, No. 76-606 (D.D.C. Dec. 17, 1976).) *See also* United States v. Hansen, 566 F. Supp. 162 (D.D.C. 1983) (prosecution, contemporaneous to *Diggs*, of congressman for ethical violations).) The *Diggs* court concluded that Representative Diggs had not shown sufficient unjustifiability to warrant discovery on the allegation of selective prosecution. *Accord*, United States v. Shober, 489 F. Supp. 393, 403-05 (E.D. Pa. 1979) (denial of evidentiary hearing in prosecution for bribery of congressman).

47. The term "selective prosecution" may be deemed a tautology: Given limited prosecutorial resources, prosecution by its nature must be selective. The entrapment defense, on the other hand, reflects a view that "it is dangerous to give law enforcement officials limitless powers to tempt citizens into criminality and then to punish those citizens for their criminal conduct." *Select Committee*, *supra* note 16, at 369. The entrapment defense is recognized in every state, in the federal courts, and by the Model Penal Code. Duke, *supra* note 42.

48. Sorrells v. United States, 287 U.S. 435 (1932); Sherman v. United States, 356 U.S. 369 (1958).

49. This test has come to be called the subjective standard, and remains the hornbook law of entrapment. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 371 (1972). For definitional problems with the term "predisposed," see Duke, *supra* note 42.

50. The police conduct test, also known as the objective standard, derives from the separate opinions of Justice Roberts in *Sorrells*, 287 U.S. at 453-59, and Justice Frankfurter in *Sherman*, 356 U.S. at 378-85. It is the law in some state courts and has been adopted by the Model Penal Code in § 2.13 (Official Draft 1962). *See* United States v. Twigg, 588 F.2d 373, 383 n.3 (3d Cir. 1978) (Adams, J., dissenting). Academic critics generally prefer some form of an objective standard over the subjective standard. *See* Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 167 n.13 (1976) (collecting sources of commentary).

In a brief comment on the subject, Joseph Goldstein reexamines the subjective-objective dispute.

protection to defendants.[51] Moreover, modern entrapment claims often cannot overcome the weight of videotape evidence.[52] A videotape shows the defendant agreeing to commit the crime, omitting possible prior negotiation or reflection that might indicate a lack of predisposition.[53]

Congressmen can also raise their claims at legislative hearings that may range from inquiries into narrowly defined wrongdoing to contemplations of impeachment.[54] The impeachment sanction, however, is so drastic as to be reserved in practice for only the most flagrant presidential abuse.[55] Legislative hearings share with legal defenses the problem that they fail to address the unique congressional vulnerability to indictment. By the time a congressman has the opportunity to raise claims post hoc, the targeting has done most of its work.[56]

The prevailing view sees entrapment as a defense, but one "objective" response would perceive entrapment as an *offense* inflicted by law enforcement agents. Professor Goldstein argues that the latter view derives from a premise that the law must protect the right of an individual to make choices free from official coercion or deception. *See* Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 685, 687–88 (1975).

51. *See* Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565, 1581 (1982) ("[T]he defendant is said to be predisposed because he committed the act, and then is held responsible for the act because he was predisposed. The pernicious circularity of this approach is obvious.").

Suggestions that outrageous police conduct might bar conviction appear in Supreme Court dicta. *See* Hampton v. United States, 425 U.S. 484, 493 (1976) (Powell, J., concurring in the judgment); United States v. Russell, 411 U.S. 423, 431–32 (1973). Yet the Supreme Court has always, and lower courts have generally, adhered to the subjective standard. *But see* United States v. Twigg, 588 F. 2d 373, 377 (3d Cir. 1978) (conviction reversed, by divided panel, on ground that outrageous police conduct violated due process of law); Carbajal-Portillo v. United States, 396 F.2d 944 (9th Cir. 1968) (conviction reversed on ground of governmental coercion).

52. None of the Abscam juries, which were presented with extensive videotape evidence, found entrapment where defendants asserted the defense: United States v. Lederer (unreported), N.Y. Times, Jan. 11, 1981, § 1, at 36, col. 1; United States v. Jenrette (unreported), N.Y. Times, Oct. 8, 1980, at A1, col. 1. In United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd*, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982), the district court's holding that defendants were entitled to acquittal on entrapment grounds, 501 F. Supp. at 1193–1203, was reversed by the Third Circuit Court of Appeals.

53. *See* Note, *supra* note 29, at 1138–39; *see also Hearings, supra* note 19, at 101–02 (suggestion by lawyer-linguist that viewers' perceptions of videotape lead to bias against defendant because of dark, murky quality of film, numbers shown upon image of defendant onscreen, and convincing simulations of criminal personalities by surrounding undercover agents).

54. *See* U.S. CONST. art. I, § 4.

55. *See* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 299 (1973) ("impeachment of the President should be a last resort"); Linde, *Replacing a President: Rx for a 21st Century Watergate*, 43 GEO. WASH. L. REV. 384, 385–89 (1975) (arguing that impeachment sanction is ineffective). This safeguard was used by the House of Representatives only once in American history: Andrew Johnson was impeached in 1867 on the technical ground of defying the Tenure of Office Act. R. BERGER, *supra*, at 252–60.

56. *Cf.* Sundquist, *The Case for an Easier Method to Remove Presidents*, 43 GEO. WASH. L. REV. 472, 477–79 (1975) (general failure of legislative and judicial checks to address executive abuse until after damage is done).

C. *Targeting and Separation of Powers*

The inadequacy of safeguards coupled with the expansion of targeting power points out the unequal division of power between the executive and legislative branches. Targeting, even absent the intent to debase an institution, divides and conquers Congress. The power imbalance breaches the implicit mandate of the first two articles of the Constitution: a system of interbranch checks, which facilitate both functional interdependence among the branches and institutional independence of each branch.[57]

Qualitative distinctions between the checks that protect and empower each branch suggest the way in which targeting intrudes upon separation of powers. The checks between branches vary not only in relative strength but in the extent to which they fulfill the aims of separation of powers. Checks in the spirit of separation of powers address institutional threats. These checks are exercised openly and officially in a manner either outlined in the constitutional text or perfected over years of forthright and principled use. Although the dividing line may be unclear, these checks respond to policies and actions rather than to the people associated with the activity. Checks at odds with separation of powers, on the other hand, are aimed at human adversaries, harming institutions indirectly. They are deployed in secret. They originate in personal battles, and the institutional artillery used in these battles becomes forever altered by its abuse.[58]

When the executive wields its law enforcement power as an aggressive

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57. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity"); THE FEDERALIST No. 48, at 308 (J. Madison) (C. Rossiter ed. 1961) (branches "connected and blended as to give to each one a constitutional control over the others"); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 15-16 (1978) (describing theory of interdependence and independence).

Professor Tribe describes a model of American constitutional government that requires the cooperation of at least two branches before any final governmental action affecting individual rights can take place. *Id.* at 16. Executive targeting violates this principle, if one accepts the premises of this Note: Subsequent judicial vindication of a targeted congressman cannot undo the finality of harm, *see supra* text accompanying note 56, and targeting eludes all ex ante sanctions that the judiciary may provide. Despite Congress' institutional failure to develop potent safeguards against executive abuse, its disapproval of targeting is also assumed. *See supra* p. 653.

58. In trying to draw a dividing line between the two checks one might ask: Can you fix it when it breaks? Institutions can resist and recover from abuse far better than individuals. Consider the following two examples of institutional checks, with the caveat that the individual-institutional dichotomy is not rigid, *see* text accompanying notes 57-59, but rather a preliminary distinction to help isolate conduct that ultimately threatens the institution of Congress. An example of an executive check upon the legislature that accords with separation of powers is the presidential veto. *See* U.S. CONST., art. I, § 7. Like any check, of course, the veto is susceptible to abuse; a president could reject a bill out of rancor toward its sponsor. But the open nature of the veto, the prospect of an override, and the force of interest groups that favor passage of the bill—all institutions of a sort—create powerful protection. A converse institutional check upon the executive branch is the power of Congress to impeach the President. *See* U.S. CONST. art. I, § 3 and art. II, § 4. The collective mobilization required for an impeachment negates the force of private agendas and individual hostility. For a thoughtful inquiry into this subject in light of the Nixon experience, see J. LABOVITZ, PRESIDENTIAL IMPEACHMENT (1978).

check against the other branches, the check becomes a potential weapon that further skews the balance of institutional powers. The executive, and no other branch, is authorized to use force, money, and personnel to enforce the law, with a wide swath of discretionary power behind it.[59] Congress, and no other branch, is composed mainly of politically accountable individuals, a composition essential to the institutional enterprise.[60]

Institutional independence cannot exist without protection of individual rights.[61] When institutional needs shape these rights into a zone of protection reserved to members of an institution, the rights take other names: life tenure, immunity, privilege.[62] Separation of powers mandates an appropriate, active protection of this kind for each branch. Unlike members of the other branches, however, congressmen currently find their constitutionally based individual protection unduly circumscribed.

II. The Arrest Clause: A Reexamination

The Supreme Court has never considered an allegation of executive targeting of congressmen as a breach of separation of powers. A specific separation of powers protection emerges, however, from analysis of the arrest clause of the Constitution. The history of the arrest clause shows that the very concept of separation of legislative and executive powers originated, in part, in the rise of privilege for members of Parliament from executive intrusion.

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59. One might argue that the size of the executive branch expands vulnerability as well as power. The actual size of the executive branch is a matter of some uncertainty. Ever since Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (President's power to remove officers of independent agencies may be restricted), commentators have described the administrative agencies as a separate branch. *See, e.g.*, Strauss, *supra* note 33 (analyzing relationship of administrative agencies to President and Congress). Questions of whether administrative agencies form a branch and whether their size somehow increases executive-branch vulnerability are largely irrelevant to a discussion of the executive's power to target congressmen. Administrative officials, unelected and in most instances anonymous to the public, do not share the vulnerabilities exploited in targeting: media scrutiny, potential harm at the polls, and the continued burden to demonstrate integrity.

60. Congressional bureaucracy, although smaller than that of the executive branch coupled with the independent agencies, expands the vulnerability of each congressman. Inasmuch as a particular staffer may be linked to a particular congressman, the potential to target that staffer amounts to the potential to targeting of the congressman. Congressional staffing has mushroomed in recent years. In 1930, there were 280 staff members working for individual senators and 870 working for individual House members; in 1976, there were 3,251 personal staff members in the Senate and 6,939 in the House. H. Fox & S. Hammond, Congressional Staffs: The Invisible Force in American Lawmaking 171 (1977).

61. *Cf.* United States v. Nixon, 418 U.S. 683, 705 (1974) (executive privilege protects "the supremacy of each branch within its own assigned area of constitutional duties").

62. *See id.* ("privileges flow from the nature of enumerated powers"). Significant examples of immunities include those of judges and executive officials for actions taken in the course of official duties. *See supra* note 11. Such immunities have long been recognized, despite the absence of explicit constitutional support. *See* Spalding v. Vilas, 161 U.S. 483, 498-99 (1896).

A. *Historical Dichotomy of Legislative Privilege*

The arrest clause derives from English parliamentary privilege.[63] Throughout its history in both England and America, privilege has served two purposes: to protect the legislator against harassment and legal action instituted by fellow citizens, and to protect all legislators against encroachments from the executive branch. These dual protections of privilege oscillated in importance. When the monarch attempted to intrude into the legislature, Parliament deployed its privilege as a shield; in times of more peaceful interbranch relations, the private protection dominated. Both invocations of privilege helped to establish Parliament as a body independent from the monarch, yet sharing authority over the populace.

Until the middle of the sixteenth century, Parliament's legislative function had not begun to dominate over its role as a judicial council and advisory body.[64] Privilege, then, served more as a blessing of safe conduct[65] than as a source of legislative independence. Parliament invoked privilege during the fifteenth century to release members and their servants from custody.[66] While not yet opposed to the executive, this use reflected a growing view of privilege as a source of independent power.

Sixteenth-century privilege remained, in the view of the majority of Parliament, a perquisite based on status. One member of the House of Commons, Peter Wentworth, made the revolutionary assertion that privilege protected freedom of debate.[67] Explicitly rejected by the rest of the House,[68] this view of parliamentary privilege nevertheless first demon-

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63. *See* Williamson v. United States, 207 U.S. 425, 438 (1908).

64. For a discussion of the development of Parliament, see R. BUTT, THE POWER OF PARLIAMENT 31-59 (1967).

65. *See* T. MAY, A TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 102 (12th ed. 1917); 2 J. REDLICH, THE PROCEDURE OF THE HOUSE OF COMMONS 153 (1908).

66. *See* C. WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE 33 (1970) (discussing release of member's servant upon claim of privilege in *Cheddre's Case* (1404)). In *Ferrers' Case* (1543), Commons for the first time delivered a member from custody upon its own authority. 1 J. HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS 53-57 (2d ed. London 1785); Neale, *The Commons' Privilege of Free Speech in Parliament,* in 2 HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT 147, 156 (E. Fryde & E. Miller eds. 1970).

67. In his challenge to the Commons, Wentworth inquired "whether free speache and free doinges, or dealinges be not graunted to euerye on of the parliament howse by lawe," and "whether it be not an Iniurye to the whole state, and against the law, that the prince or priuie councell should send for any membre of this howse in the parliament tyme, or aftre the end of the parliament . . . ." Neale, *Peter Wentworth,* in 2 HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT, *supra* note 66, at 246, 258.

68. When Wentworth announced his challenges to the House, Commons stopped his further proceeding "out of a reverend regard for her majesty's honour." SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 369 (C. Stephenson & F. Marcham eds. 1937). The House then ordered Wentworth sent to the Tower. Neale, *supra* note 67, at 259.

strated the enduring link between individual privilege and separation of powers.[69]

Wentworth's innovative view gained more approval among legislators in the seventeenth century,[70] when the Stuart kings James I and Charles I responded to their adversaries in Parliament with what might fairly be termed executive targeting.[71] One tactic was known as "pricking for sheriff." Since a sheriff could not serve in Parliament, the Stuart kings were able to curtail opposition to the monarchy by appointing political enemies in Commons to be sheriffs in the hinterland.[72] In several dramatic incidents, culminating in the beheading of Charles I in 1649, Parliament battled both kings over the question of supremacy.[73] With no written constitution, Parliament relied on tenets of privilege to support its assertion of independence.[74]

After the English constitutional crisis had abated, privilege shifted back to providing insulation only from private citizens,[75] protecting against impleader, subpoenas, jury service, and actions for seizure of goods brought under the common law.[76] During the internally tranquil reign of the Hanovers, Parliament began to trim its privileges through legislation[77]

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69. *See* 3 P. HASLER, THE HOUSE OF COMMONS 1558-1603, at 598 (1981) (Wentworth's view "a novel and revolutionary conception, without historical justification" in English constitutional analysis).

70. Foreign affairs had dominated the national attention under Elizabeth; once the major foreign questions were resolved, those of a constitutional nature came to the forefront. *See* J. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 1603-1689, at 5-7 (1966).

71. *But see* E. WINGFIELD-STRATFORD, KING CHARLES AND THE CONSPIRATORS at ix (1937) (suggesting that Charles was victim of "a revolutionary conspiracy, pursued with an entire lack of scruple").

72. *See* C. WITTKE, *supra* note 66, at 38; *see also* J. TANNER, *supra* note 70, at 56-57 (quoting king's counselor, Sir Benjamin Rudyerd: "The rank weeds of Parliament are rooted up, so that we may expect a plentiful harvest the next.").

73. For a contemporary account of King James's breaches of privilege, see THE PARLIAMENTARY DIARY OF ROBERT BOWYER 1606-1607, at 15, 35, 99-100 (D. Willson ed. 1931). James asserted that privilege existed by sufferance of the throne; Commons, in their Protestation of December 18, 1621, replied that privilege was theirs by "ancient and undoubted birthright." F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 243 (1908). Parliament's struggle with King Charles is detailed in 1 J. HATSELL, *supra* note 66, at 145-50; H. HULME, THE LIFE OF SIR JOHN ELIOT (1957); J. TANNER, *supra* note 70, at 51-67. The most dramatic conflict occurred in January 1642, when King Charles stormed Parliament, demanding the surrender of five members whom he accused of treason. *See* M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 1 (1943).

74. Parliament eventually proclaimed "pricking for sheriff" a breach of privilege in 1765. C. WITTKE, *supra* note 66, at 38.

75. For accounts of insulating uses of privilege in this period, see 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 544-45 (1938); 1 E. PORRITT, THE UNREFORMED HOUSE OF COMMONS 571 (1903) ("[M]en procured election to the House in order that they might evade their creditors, and keep outside the debtors' prisons"); C. WITTKE, *supra* note 66, at 39 (traffic in forged "protections," which identified bearer as servant of member of Parliament and served to stop all actions at law).

76. O. WILSON, A DIGEST OF PARLIAMENTARY LAW 237-38 (2d ed. Philadelphia 1869).

77. Parliament abolished "protections," *see supra* note 75, in 1718. *See* 10 W. HOLDSWORTH, *supra* note 75, at 545 n.9 (declaration that all protections were void, and imposing on members of Commons who issued them obligation to make satisfaction to injured parties). In 1770 the Parliamentary Privilege Act, 10 Geo. 3, ch. 50, sharply curtailed privilege. T. MAY, *supra* note 65, at 106.

and general disuse.[78] The American colonial governments were established in this period. Physically distant from an independent executive and influenced by the dormant phase into which English parliamentary privilege had entered, the American legislative assemblies did not need, and therefore did not establish, privilege as an adversarial safeguard.[79] This was the context, then, in which the Framers of the Constitution contemplated legislative privilege.

B. *The American Imperative*

On August 20, 1787, the constitutional convention determined that legislative privilege would be part of the Constitution.[80] The Framers, who both hated monarchical supremacy and feared legislative power of an "encroaching nature,"[81] decided to include in the Constitution a privilege that was at the time firmly based on status. Given the prevailing sentiment that no person was entitled to special perquisites that did not enhance the function of government, this decision suggests that the Framers believed that a threat from the executive might emerge.

1. *An End to Dichotomy*

By expressing the separateness of the legislature with respect to freedom from arrest and freedom of debate, the privileges clause comes closer than any other textual provision to a constitutional affirmation of institutional integrity as mandated by separation of powers.[82] Legislative privi-

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These reforms resulted from a widespread view that privilege had been abused. For examples of extreme applications of privilege, see *supra* note 75; *see also* 1 J. HATSELL, *supra* note 66, at 132 (paternity suit against servant of member of Parliament deemed breach of privilege); 10 W. HOLDSWORTH, *supra* note 75, at 545 n.7 (breach of privilege to kill "rabbits from the warren of Lord Galway a member").

78. *See* C. WITTKE, *supra* note 66, at 203 (reforms of nineteenth century, increased representativeness, and solidification of power within Commons created climate where "sweeping claims of privilege were no longer so necessary to protect [Commons] in the exercise of its legislative activities, and to guard it against encroachments from Crown, Lords, and courts").

79. *See* M. CLARKE, *supra* note 73.

80. *See* 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 340-41 (rev. ed. 1966). Legislative privilege had been part of the Articles of Confederation as well:

> Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress: and the members of Congress shall be protected in their persons from arrest and imprisonments, during the time of their going to and from, and attendance in, Congress, except for treason, felony, or breach of the peace.

ARTICLES OF CONFEDERATION AND PERPETUAL UNION, art. 5, para. 5, *reprinted in* M. JENSEN, THE ARTICLES OF CONFEDERATION 264 (1940).

81. THE FEDERALIST No. 48, at 308 (J. Madison) (C. Rossiter ed. 1961).

82. *Cf.* United States v. Helstoski, 442 U.S. 477, 491 (1979) (purpose of speech or debate clause "to preserve the constitutional structure of separate, coequal, and independent branches of government"); Stamler v. Willis, 287 F. Supp. 734, 738 (N.D. Ill. 1968) (speech or debate clause only explicit constitutional provision of separation of powers).

lege is a force for equality between branches, not superiority of congressmen over their fellow citizens.

Proffered constructions of legislative privilege, however, have obscured its constitutional significance. Two Supreme Court cases squarely discuss the arrest clause.[83] *Williamson v. United States*[84] held that arrest for any criminal charge falls under the clause's exemptions from immunity: treason, felony, and breach of the peace.[85] *Long v. Ansell*,[86] a short Brandeis opinion, determined that congressmen are not immune from civil process.[87] Because *Williamson* ended immunity from all criminal arrests and *Long* ended immunity from the modern vestige of civil arrest,[88] the arrest clause now provides no shelter from legal sanctions. *Williamson* and *Long* properly have discredited one half of the privilege dichotomy—immunity from the law. Yet because they do not pertain to executive abuse, they do not diminish the clause's historical and constitutional role.

Williamson, the Supreme Court's only discourse on the history of the arrest clause, relied strongly on the works of political and legal historians who argued for the importance of privilege,[89] and then reached a verdict narrowing its protection. By contemplating the constitutional argument and then ruling against exempting congressmen from the law, *Williamson* has left open an alternative category not impugned by Representative Williamson's harking back to the abuses of his legislative ancestors. Likewise *Long*, which did not adjudicate executive action, did not foreclose grounding the protection of certain constitutional needs in the arrest clause. Although privilege as perquisite fulfills no constitutional goal, privilege as freedom from executive intrusion remains to be examined by the Supreme Court.

Speech or debate clause decisions[90] reflect an effort to construe privilege

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83. In Burton v. United States, 196 U.S. 283 (1905), the Supreme Court used the arrest clause as a ground for jurisdiction, but declined to interpret it.

84. 207 U.S. 425 (1908).

85. *Id.* at 438-43. Williamson, a member of Congress, was arrested for conspiring to suborn perjury. He argued that this indictment charged neither a felony, nor breach of the peace, nor treason, and hence that his arrest was unconstitutional.

86. 293 U.S. 76 (1934).

87. For contemporary comment, see Note, *Congressional Exemption from Suit and Responsibility and the* Long *Case*, 3 GEO. WASH. L. REV. 231 (1935).

88. The Judgements Act of 1838 had the effect of abolishing arrests in civil cases in England. K. BRADSHAW & D. PRING, PARLIAMENT AND CONGRESS 94 (1972). The abolition of civil arrests in the United States began somewhat later; these arrests continued into the twentieth century. *See, e.g.*, Kalloch v. Elward, 118 Me. 346, 108 A. 256 (1919) (arrest for alienation of affections of plaintiff's husband).

89. These included Blackstone, *see Williamson*, 207 U.S. at 439-40, Joseph Story, *see id.* at 443-44, and Luther Cushing, *see id.* at 444-45. It is not clear why the *Williamson* opinion discussed at length the history of the arrest clause only to remand the case on procedural grounds. For discussion of this choice, see J. DALY, THE USE OF HISTORY IN THE DECISIONS OF THE SUPREME COURT: 1900-1930, at 79-80 (1954).

90. United States v. Gillock, 445 U.S. 360, 368-69 (1980); Hutchinson v. Proxmire, 443 U.S.

as a source of legislative integrity and independence. Like *Williamson* and *Long*, these decisions manifest at first a narrow view; they have been described as emasculations of legislative privilege.[91] Speech or debate claims have failed as asserted bars to prosecution[92] and as defenses to civil claims.[93] In the recent speech or debate cases, however, the Supreme Court has presented its functional approach to legislative privilege.[94] Under this view, privilege is examined in terms of how it advances the legislative enterprise. A privilege merely giving a congressman special advantage with regard to his or her legal obligations serves no functional need. Thus, privilege may protect the legislative acts of a congressman's aide,[95] but not a congressman's promise to perform legislative acts.[96] The Supreme Court's holdings in both arrest clause and speech or debate clause cases do not reject the clauses' protections, but rather begin the process of eliminating the unneeded half of the privilege dichotomy.

2. *Current Meaning and Function of the Arrest Clause*

Viewed together, the arrest clause and the speech or debate clause address executive targeting. Freedom of speech and debate epitomizes legislative independence, the *raison d'etre* of privilege[97] and of the legislature itself. The speech or debate clause, however, can protect only part of that independence. As interpreted, the speech or debate clause protects legislative acts only:[98] It declares the right, but its protection ends with legisla-

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111, 123-27 (1979); United States v. Helstoski, 442 U.S. 477, 491-92 (1979); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501-03 (1975); Doe v. McMillan, 412 U.S. 306, 311-12 (1973); Gravel v. United States, 408 U.S. 606, 616 (1972); United States v. Brewster, 408 U.S. 501, 507-09 (1972); Powell v. McCormack, 395 U.S. 486, 503 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169, 177-82 (1966); Tenney v. Brandhove, 341 U.S. 367, 372-73 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1880).

91. *See* Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 SUFFOLK U.L. REV. 1019, 1067-69 (1974).

92. *E.g.*, United States v. Brewster, 408 U.S. 501 (1972) (former senator convicted for taking bribe even though conduct related to legislative acts); United States v. Myers, 635 F.2d 932, 937 (2d Cir.) (statute prohibiting bribery of members of Congress does not violate speech or debate clause), *cert. denied*, 449 U.S. 956 (1980).

93. *See* Hutchinson v. Proxmire, 443 U.S. 111 (1979).

94. *Cf.* Gravel v. United States, 408 U.S. 606, 617 (1972) ("prior cases have plainly not taken a literalistic approach in applying the privilege").

95. *Gravel*, 408 U.S. at 616-17. Although the Court found that Senator Gravel's aide shared his constitutional immunities, the holding—that the speech or debate clause protection did not apply—has led to criticism that the term "legislative acts" as interpreted by the Court excludes too much necessary conduct and ultimately harms legislative independence. *See* Cella, *supra* note 91, at 1042-46 & n.87; Ervin, *The* Gravel *and* Brewster *Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175, 191 (1973).

96. United States v. Brewster, 408 U.S. 501 (1972).

97. *See* United States v. Johnson, 383 U.S. 169, 182 (1966) (speech or debate clause designed predominantly to prevent the instigation of criminal charges against "critical or disfavored legislators"); *see also* United States v. Brewster, 408 U.S. 501, 507 (1972) (purpose of speech or debate clause to protect integrity of legislative process by ensuring independence of individual legislators).

98. *See* Note, *Evidentiary Implications of the Speech or Debate Clause*, 88 YALE L.J. 1280, 1282

tive business.[99] A broader interpretation risks covering congressmen with blanket immunity. Unlike the arrest clause, moreover, the speech or debate clause contains no temporal reference but limits its protection to the chambers. It is written in absolute terms, without exceptions.[100] These traits, found in both the text and judicial interpretation, suggest that the speech or debate clause contains the more unwavering and narrow of the privileges. A separate safeguard must guard against executive attacks on private activity.[101]

The arrest clause answers the constitutional need for a safeguard against executive attacks on individual legislators.[102] Its textual contrast of arrests that threaten legislative independence with those that are innocuous parallels the difference between targeting and legitimate law enforcement. To a greater degree than the speech or debate clause, the arrest clause speaks to executive action—at least since arrests in civil cases were abolished—while the speech or debate clause pertains to post hoc inquiry in a judicial forum. The history of freedom of speech within Parliament is also shared by the arrest clause, as members of Commons who asserted their freedom to speak were arrested and confined to the Tower of London.[103] History shows, moreover, that freedom from arrest—the older[104] and more solidly accepted

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(1979) ("distinction between protected legislative acts and unprotected nonlegislative acts . . . has shaped substantive immunity under the speech or debate clause").

99. The Supreme Court has identified examples of conduct connected to legislative acts that is unprotected by the speech or debate clause. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111 (1979) (newsletters and Golden Fleece award, a "defamatory statement," was not protected because not "essential to the deliberations of the Senate"); Gravel v. United States, 408 U.S. 606, 625 (1972) (legislators often "cajole, and exhort" in relations with executive branch over administrative conduct, yet these acts are not protected).

100. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509-10 (1975).

101. One commentator, however, has argued for a broad and self-enforcing protection derived from the speech or debate clause. *See* Cella, *supra* note 91; Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U. L. REV. 1, 42-43 (1968).

102. Early constitutional theorists recognized the relationship between the protection of individuals from arrest and the vigorous functioning of a representative body. As Justice Story observed, the arrest privilege was for the benefit of

> constituents, that they may not be deprived of the presence, services, and influence of their own Representative in the national councils. It might otherwise happen, that he might be arrested from mere malice, or from political persecution, or upon some unfounded claim, and thus they might be deprived of his aid and talents during the whole session.

J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 93-94 (2d ed. New York 1847). *See also* T. JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 17 (1872) (arrest deprives constituents of their "voice in debate and vote").

103. *See* 1 J. HATSELL, *supra* note 66, at 145-46 (arrest by King Charles of adversaries in Commons); F. MAITLAND, *supra* note 73, at 320 (arrest of Sir John Eliot, King Charles's leading adversary in Parliament); W. NOTESTEIN, THE HOUSE OF COMMONS 1604-1610, at 501 (1971) (Queen Elizabeth's practice of "sending to prison for a vacation (usually short) those whose utterances dealt with matters that she believed to be her prerogative"); Neale, *supra* note 67, at 259 (arrest of Peter Wentworth and others).

104. The precise chronological origins of both privileges are obscure. One historian dates the

privilege[105]—has been amenable to meeting flexibly the needs of a legislature. Throughout its history the arrest privilege included freedom from general molestation. General molestation, in constitutional terms, is analogous to action that may never reach formal adjudication but whose early, amorphous stages can harm a congressman and thereby threaten separation of powers. A protection against this potential for abuse should accord with the needs suggested by the text and history of the arrest clause.

III. Monitoring Legislative Integrity

In the effort to locate the imperative of the arrest clause, a literalist approach necessarily fails. The clause cannot say explicitly what privilege should encompass, because the evil at which it is aimed—executive molestation of a congressman outside the sphere of legislative acts—can dodge whatever provisions appear in the text.[106] For this reason, the clause has been subject to continued reinterpretation throughout its life under monarchy, parliamentary supremacy, and American tripartite government.[107] The substance of the arrest clause seems mercurial because executive targeting is elusive: Targeting and legitimate law enforcement differ only in what impels the action, rather than in the action itself. Because of this distinction, subtle yet of great importance to separation of powers principles, the arrest clause stands for a protection against the harmful effect of executive motive.

The protections suggested by a historical reading of the arrest clause should coexist, of course, with the executive's duty to enforce the law against the members of the other branches. A modern application of legis-

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beginning of privilege from arrest to the laws of Ethelbert, developed at the end of the sixth century. T. May, *supra* note 65, at 102. The privilege was first codified in a statute of Henry IV. Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers,* 86 Harv. L. Rev. 1113, 1122 n.46 (1973). Wittke argues that privilege in general must be viewed to begin in the early fifteenth century, when Parliament began to resemble a modern legislature. C. Wittke, *supra* note 66, at 33 n. 40. It is clear, however, that the privilege from arrest predates freedom of speech and debate.

105. The early drafts of privilege provisions in the Constitution stated: "The delegates shall be privileged from arrest (or assault) *personal restraint* during their attendance, for so long a time before and after, as may be necessary . . . (and they shall have no other privilege whatsoever)." 2 M. Farrand, *supra* note 80, at 140 (emphasis in original). Later versions added the protection of freedom of speech and debate. *See id.* at 166.

106. Blackstone noted the infirmity of a literalist view:

> Privilege of parliament was principally established, in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown. . . . [If privilege were defined too narrowly] it were easy for the executive power to devise some new case, not within the line of privilege, and under pretense thereof to harass any refractory member and violate the freedom of parliament.

1 W. Blackstone, Commentaries *164.

107. *See* United States v. Gillock, 445 U.S. 360, 369-70 (1980) (limits of application of English history to American constitutional analysis); *see also* United States v. Brewster, 408 U.S. 501, 507-08 (1972) (same); 2 J. Wilson, Works 35 n.2 (J. Andrews ed. 1896) (rejecting application of Blackstone's view, *see supra* note 106, to American government).

lative privilege should not vitiate robust protection against congressional wrongdoing. Congress must protect itself against law enforcement abuse, yet it must meet this need without compromising its collective honor.

Parliamentary history suggests that Congress should be the judge of its own privileges.[108] In this view, Congress itself would fulfill the mandate of the arrest clause, and provide a check against executive targeting. Variations of this approach range from the executive's being required to notify the speaker of the House when beginning an intrusion[109] to having Congress control virtually all law enforcement against its members.[110] The objection to this view is similar to the objection to targeting: Policing of oneself—like the conjunction of the power to decide to investigate a political adversary in Congress, indict, prosecute, and announce news stories of one's actions—centralizes too much power and invites abuse.[111] Ultimately congressional self-monitoring would sacrifice institutional legitimacy at the altar of separation of powers.

Congress, then, should pass legislation delegating the protection of its privileges to the judiciary. Delegation does not remove from Congress its proper responsibility, but rather ensures optimal integrity of the check against the executive. The judiciary is also uniquely competent to undertake review of law enforcement action.

Under this proposal, a court of legislative integrity would review prospectively[112] all law enforcement action against congressmen. The panel

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108. This concern is reflected in the early American discussions of legislative privilege. At the end of the Congress of the Confederation in June 1777, the delegates resolved that Congress would have authority to protect its privileges. L. CUSHING, LEGISLATIVE ASSEMBLIES IN THE UNITED STATES 221 n.1 (9th ed. Boston 1874); *cf.* Note, *Legislative Power to Punish Contempt*, 3 GEO. WASH. L. REV. 468, 477–82 (1935) (rights of Congress to use coercion and sanctions). *But cf.* Kilbourn v. Thompson, 103 U.S. 168 (1880) (curtailing congressional authority to punish for contempt).

109. The historical endurance and flexibility of this idea is suggested by its reiteration through centuries of the literature. *Compare* 2 J. HATSELL, *supra* note 66, at 259 (king who arrests member of Parliament should promptly notify house leadership) *with* Penikett & Michael, *Yukon Legislative Assembly: Report of Special Committee on Privileges on Wiretapping of a Member's Telephone*, PARLIAMENTARIAN, Jan. 1982, at 51–56 (Royal Canadian Mounted Police must inform speaker when installing wiretap; speaker's consent not needed). This approach is probably best suited to parliamentary government, where the speaker of the house can provide a more direct and powerful safeguard against law enforcement intrusion. *See* L. CUSHING, *supra* note 108, at 248 (Congress need not receive advance notice of arrest of member).

110. Professor Cella has argued for congressional control of law enforcement actions against its members. *See supra* note 101; *cf.* United States v. Eilberg, 465 F. Supp. 1080, 1083 (E.D. Pa. 1979) (ethics committee, by disciplining member, exercises Congress' right to preserve its independence).

111. Congressional self-policing today takes place in the form of censures, denunciations, and, in very rare cases, expulsions of members. Congress uses these measures so sparingly that only a few errant members have felt their force: Between 1900 and June 1980, Congress censured or denounced only nine members, *see* U.S. NEWS & WORLD REPORT, June 23, 1980, at 61, even though one study, *see* Peters & Welch, *supra* note 16, at 701, used a data base of 81 congressmen accused of corruption between 1968 and 1978 alone. This reluctance suggests considerable infirmity in leaving ethical controls solely in the hands of Congress.

112. For the dangers of allowing review to remain retrospective, *see supra* text accompanying notes 14–15, 56. *But cf.* Comment, *Administration of the Affirmative Trap and the Doctrine of En-*

would review action including, but not limited to, sting operations,[113] income tax audits, physical surveillance, and surreptitious gathering of information—intrusions into the private as well as the public lives of congressmen. The court would infer hostility toward a particular congressman if the executive could not show reasonable suspicion that the congressman had been engaging in criminal activity.

In addition, this proposal would not permit the executive to begin the law enforcement action without the court's approval. It would also forbid the executive from announcing that it had submitted a proposal to the panel. Sanctions for violating this preclearance provision would be determined by Congress; they should include quashed prosecutions and a damages remedy.

Such preclearance is probably constitutional. Courts have approved similar judicial oversight of law enforcement action created by the Foreign Intelligence Surveillance Act.[114] A special constraint upon unchecked law enforcement against congressmen does not break new ground in limiting executive discretion and would not threaten separation of powers; separation of powers principles are reinforced, not imperiled, by this tripartite check.[115]

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trapment: Device and Defense, 31 U. CHI. L. REV. 137, 173–74 (1963) (retrospective review sufficient for entrapment cases).

113. The American Civil Liberties Union has argued, in an unpublished report, that sting operations directed at all citizens demand heightened scrutiny; the report characterized an undercover agent as analogous to a hidden microphone and urged that the FBI be required to obtain a judicial warrant before staging a ruse offering someone the opportunity to commit a crime. N.Y. Times, Oct. 4, 1982, at B9, col. 1. Although this suggestion was rejected by the Abscam select committee, *see Select Committee, supra* note 16, at 387–89, the House Subcommittee on Civil and Constitutional Rights has recommended legislation that would require the FBI to obtain a judicial warrant before beginning an undercover operation. *See FBI Undercover Operations, supra* note 15, at 83–85.

114. *See* 18 U.S.C. § 2518 (1982). One district court has twice approved the constitutionality of the Foreign Intelligence Surveillance Court, a panel of federal district court judges who consider government requests to use electronic surveillance in particular cases. *See* United States v. Megahey, 553 F. Supp. 1180, 1195 (E.D.N.Y. 1982); United States v. Falvey, 540 F. Supp. 1306, 1311, 1314–15 (E.D.N.Y. 1982); *cf.* United States v. Belfield, 692 F.2d 141, 148–49 (D.C. Cir. 1982) (affirming conviction involving use of Foreign Intelligence Surveillance Court where defendants asserted constitutional challenge). The court has operated in secret since its inception in May, 1979. As of January, 1983, it had approved all 1,422 applications brought before it by the Justice Department lawyers precleared to appear before it. *See* Peck, *A Court That Never Says No*, THE PROGRESSIVE, Apr. 1984, at 18; *see also* Schwartz, *Oversight of Minimization Compliance Under the Foreign Intelligence Surveillance Act: How the Watchdogs are Doing Their Jobs*, 12 RUT.-CAM. L.J. 405, 435–36 (1981) (describing court's procedures). To establish the court of legislative integrity at minimal expense and administrative inconvenience, the judges currently serving on the F.I.S.C. could simply assume legislative-integrity duties.

115. One commentator has encouraged Congress to use its legislative power to expand judicial oversight. *See* 5 A. BOYAN, CONSTITUTIONAL ASPECTS OF WATERGATE 442–43 (1979) (Congress should extend initiative begun in wiretap statute toward greater checks on executive activity); *see also* M. HALPERIN & D. HOFFMAN, FREEDOM VS. NATIONAL SECURITY 13–16 (1977) (right of Congress to expand judicial review of law enforcement activity).

The major difference between foreign intelligence surveillance and executive targeting is the additional political question difficulty raised by judicial oversight of executive-legislative relations. *See* J. CHOPER, *supra* note 33, at 307–08 (judicial intervention as disincentive to settlement of political

No sanction, of course, can entirely address the problem of targeting. An executive determined to abuse the law enforcement power could obscure its motive, investigate covertly before submitting the action for review, or otherwise deceive the court. The court also would have to consider multiple or conflicting motives held by individual members of the executive branch. Faced with both bad motive and evidence of reasonable suspicion, the court would have to balance the harm of condoning legislative wrongdoing against the harm of bolstering pernicious executive motive. These problems, although difficult, are amenable to case-by-case scrutiny. Moreover, the experience of the Foreign Intelligence Surveillance Court suggests that the creation of such judicial oversight might have an independently healthy effect on both law enforcement and congressional integrity. In any case, because executive targeting may damage a congressman irreparably before formal adjudication takes place, the role of the judiciary must not be limited to after-the-fact review.

CONCLUSION

The need for legislative privilege has not reached the point of the English constitutional crisis: There are no present-day analogues to King Charles, combining sufficient power with sufficient hostility to the legislature. What do exist, however, are the dangerous powers of targeting and their proven, if sporadic, use. A modest and precedented judicial safeguard against the abuse of executive action toward a congressman can counter the threat of targeting.

Without such a procedural safeguard, the philosophy behind the arrest clause goes unsatisfied. The clause does not deliver to congressmen total immunity from any form of executive molestation, but it also does not, as some readers of *Williamson* might have thought, leave congressmen totally vulnerable to arrest for any indictable offense. It offers instead a middle path: freedom from pernicious executive intrusion, as determined by the neutral third branch.

—Anita Bernstein

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disputes between executive and Congress). *But see* M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 54–57 (1982) (defense of interventionism in these disputes). *See also* Note, *The Foreign Intelligence Surveillance Act: Legislating a Judicial Role in National Security Surveillance*, 78 MICH. L. REV. 1116, 1117 (1980) (collecting views of congressmen opposed to Act); *id.* at 1144–50 (although Act raises political question problems, Note concludes that Act does not violate doctrine).